

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RILEY LEON HUGHES,
Appellant,
vs.
J. HERMAN GENGLER,
Appellee.

NO. 22122

BRIEF FOR APPELLEE

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FILED

SEP 15 1967

WM. B. LUCK, CLERK

SEP 25 1967

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JURISDICTION

This action was originally filed in the Small Claims Court for the Marysville Judicial District, County of Yuba, State of California, to recover from the Postmaster of the United States Post Office at Marysville, California, for the alleged mishandling of mail matter. The action was removed to the United States District Court for the Eastern District of California by the defendant on June 23, 1966, pursuant to the provisions of Title 28 U.S.C. § 1442(a)(1).

The District Court entered its final decision against the plaintiff on July 18, 1967. Jurisdiction of this Court is accordingly predicated upon the provisions of Title 28 U.S.C. § 1291.

STATEMENT OF THE FACTS

After hearing and receiving all of the appellant's evidence in plenary trial, the District Court found the following facts:

1. Defendant is Postmaster of the United States Post Office at Marysville, California, and was at all times involved herein acting under color of such office.
2. A letter arrived at the Marysville Post Office addressed to the plaintiff on or about May 31, 1966.
3. An employee of the Post Office determined that there was three cents postage due on said letter and made that fact known to the plaintiff.
4. Plaintiff paid the three cents "under protest."
5. Plaintiff was not in any way coerced into paying the said three cents, but rather had the clear choice himself whether to pay or not to pay the said amount allegedly due.^{1/}

ARGUMENT

The District Court found that appellant, having the clear choice whether or not to pay the three cents allegedly due on the special delivery letter, and not acting under any

^{1/} The District Court's Findings of Fact, filed July 18, 1967. See also Memorandum and Order of the District Court, filed May 1, 1967.

coercion whatsoever, chose to pay the three cents. By this action, appellant seeks to recover the amount so paid, plus costs and expenses which he seeks to attach.

As the District Court pointed out in its Memorandum and Order:

"It is elementary law that if a person pays even an illegal demand . . . or pays a demand through ignorance or misapprehension of law respecting its validity, but not under compulsion or coercion, he cannot recover the money so paid (See: Pure Oil Co. v. Tucker, 164 F.2d 945; American Oil Service Inc. v. Hope Oil Company, 233 Cal. App. 2d 822; Thompson v. Thompson, 218 Cal. App. 2d 804; Holm v. Bramwell, 20 Cal. App. 2d 332; and McMillan v. O'Brien, 219 Cal. 775)."

Thus, the District Court concluded, we submit correctly, that appellant was entitled to no relief. The Court accordingly did not reach the question of whether the demand was legal or illegal.

The instant case is thus readily distinguishable on this fact alone from Teal v. Felton, 53 U.S. 284 (1851), upon which appellant seeks to rely, since in that case the plaintiff had refused to pay the postage due.

This was not a case involving mutual mistake of fact (Compare Hannah v. Steinman, 159 Cal. 142 (1911)) as contended by appellant. There is no finding, nor was there

any evidence whatsoever, that either appellant or any representative of the Post Office was laboring under any mistake of fact at the time of the payment.

Moreover, even if the District Court had erred in its conclusion, which we submit it did not, there were no findings nor was there evidence upon which the Court could have entered any judgment in favor of the plaintiff. The sole defendant named or served in the action below was Postmaster J. Herman Gengler. Yet there is no finding and there was no evidence whatever at trial of any act or omission on his part which could possibly give rise to liability.^{2/} On appeal, appellant alleges that the Postmaster declined to accept his protest.^{3/} This, however, according to appellant's allegations on appeal, was after the allegedly illegal demand was made and after it was paid by appellant.^{4/}

^{2/} This case is therefore distinguishable from Teal v. Felton, supra, on this fact as well as that noted above.

^{3/} Brief for Appellant, p. 10


^{4/} On appeal, appellant also asserts that the United States Post Office and John Does should have been included as defendants to this action. The Court would have been without jurisdiction to enter judgment against the United States (Title 28 U.S.C. § 2680(b)), even if it had been named and served, or against any fictitious defendants (See Molnar v. National Broadcasting Company, 213 F.2d 684 (9th Cir. 1956)).

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the District Court should be affirmed.

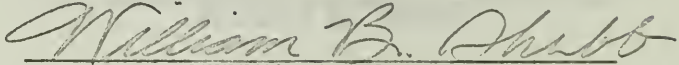
Respectfully submitted,

JOHN P. HYLAND
United States Attorney

By 
WILLIAM B. SHUBB
Assistant U. S. Attorney

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



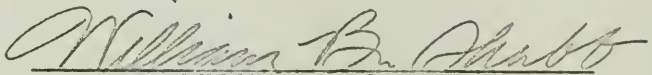
WILLIAM B. SHUBB

Assistant United States Attorney

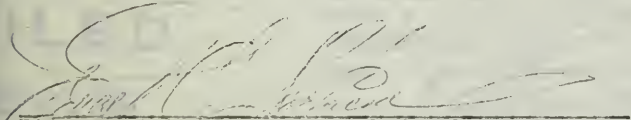
CERTIFICATE OF MAILING

This is to certify that three copies of the foregoing Brief for Appellee was this date mailed to Riley Leon Hughes, 1608 Elm Street, Marysville, California 95901.

DATED: September 14, 1967


WILLIAM B. SHUBB

Subscribed and sworn to before me
this 14th day of September, 1967.


DEPUTY CLERK, UNITED STATES DISTRICT
COURT, EASTERN DISTRICT OF CALIFORNIA

